SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 30 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 256

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,
Petitioner,

v.

ANTHONY E. STEFANELLI, *et al.*,
Respondents,

and

PAUL V. DURKIN, *et al.*,
Respondents,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING AND APPENDIX OF FIRST MERCANTILE CONSUMER DISCOUNT COMPANY

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING

This petition, presented on behalf of appellant First Mercantile Consumer Discount Company, respectfully seeks a determination by this Court as to whether the

Court's prior Order dismissing this appeal constitutes (1) a dismissal on the merits (*i.e.*, for want of a substantial federal question as in *Gorun* v. *Montana*, 399 U. S. 901 (1970)), or (2) a procedural dismissal for want of a final judgment (as in *Laikind* v. *Attorney General*, 397 U. S. 148 (1970)), a ground asserted by appellees. For reasons set forth below, this clarification is crucial to the proper and efficient disposition of further State court proceedings which are about to commence.* Petitioner seeks this clarification as a matter of fundamental justice.

The instant appeal sought review of the decision of the New Jersey Supreme Court, by vote of 4 to 3, sustaining the validity of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1, *et seq.*, against the contention that it violates the Commerce Clause, the Full Faith and Credit Clause and the Due Process Clause of the *United States Constitution*. *Oxford Consumer Discount Co.* v. *Stefanelli*, 55 N. J. 489, 262 A. 2d 874 (1970). The case involves a serious confrontation between the States of New Jersey and Pennsylvania, so much so that the Attorney General of New Jersey intervened on behalf of appellees and the Attorney General of Pennsylvania filed an *amicus* brief in support of appellant's position.

Although the New Jersey Supreme Court entered final judgment on the merits of this controversy, definitively resolving the constitutional issues, it left open for further litigation the extent to which its judgment should be applied retroactively. 55 N. J. at 491-94, 262 A. 2d at 875-77. On this basis, appellees argued at length that this appeal should be dismissed for want of a final judgment.

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* Efforts to resolve this question administratively were unsuccessful. See Affidavit of Roger S. Clapp, set forth in the Appendix attached hereto.

See Point I of New Jersey Attorney General's Motion to Dismiss (pp. 8-14) and Point I of the Joint Motion to Dismiss filed by the other appellees (pp. 6-12). Thus, because there has never been a plenary factual adjudication (the case arose on cross-motions for summary judgment), New Jersey's Attorney General argued (at p. 14 of his Motion to Dismiss):

> ". . . there still exists a disturbing aura of incompleteness stemming from the utter absence of a fully tried record detailing, with exactitude, the circumstances surrounding any particular second mortgage loan transaction . . . The present posture of the litigation clearly does not permit enlightened consideration and, in view of the remand and what will follow at the trial level as a result, there has not yet been the 'final adjudication' which 28 U.S.C. §1257 contemplates."*

In these circumstances, this Court, contrary to its regular practice, entered the following Order on October 12, 1970:

> "The appeals are dismissed. Mr. Justice Black and Mr. Justice Stewart are of the opinion that probable jurisdiction should be noted."

After exhausting administrative approaches (Affidavit of Roger S. Clapp, appended hereto), this petition for rehearing was prepared. Its primary purpose is to urge this Court to amend its prior Order so as to specify whether the dismissal of the appeal herein is procedural

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* Our analysis of the Final Judgment Rule reached the opposite conclusion. See Reply Brief of Appellant First Mercantile Consumer Discount Company, pp. 2-17.

(for lack of final judgment) or on the merits. *Cf. Parks v. Simpson Timber Co.*, 389 U. S. 909 (1967); *Slochower v. Board of Higher Education*, 351 U. S. 944 (1956); *Union Trust Co. v. Eastern Air Lines*, 350 U. S. 962 (1956); *Securities & Exchange Commission v. Drexel & Co.*, 349 U. S. 910 (1955). The reasons for this plea are:

1. If the dismissal of this appeal was predicated upon the absence of a "final judgment," 28 *U.S.C.* §1257, and if this Court has accepted the argument of New Jersey's Attorney General that a factual record should be made prior to consideration of the constitutional questions, then the litigants and the courts below should be aware of this determination. Otherwise, the courts below may reject the offer of evidence respecting the constitutional issues on the premise that this Court's dismissal was on the merits.

2. Beyond the dilemma described above, the parties hereto and the courts below will be faced with a further problem. Respondents (appellees) Paul V. Durkin, *et al.*, have asserted a class action against petitioner (appellant) First Mercantile. The propriety of this class action is now pending before the Appellate Division of New Jersey's Superior Court. Whether the Federal constitutional questions posed in the instant appeal are still open, or have been laid to rest, will have substantial bearing on the resolution of the class action issue.

3. If this Court's dismissal of the instant appeal was procedural only—a matter of ripeness—petitioner First Mercantile will file a new Jurisdictional Statement upon the termination of the litigation below; it will be required (by business exigencies) to do so no matter how the State courts deal with the question of retroactivity. It would seem unfair to put this party to the expense of a further

appeal if, in fact, the dismissal of the instant appeal was on the merits and hence *res judicata*.

4. If this Court's dismissal was on the merits, the ramifications beyond the parties hereto will be serious and widespread. There will be a substantial and adverse impact on Pennsylvania businesses, as is indicated in the *amicus* brief filed by Pennsylvania's Attorney General. If that is not what was meant by the Order that "The appeals are dismissed," then clarification would surely be in the interests of justice and fair play.

Petitioner respectfully advances one additional point. If the dismissal was on the merits, petitioner requests reconsideration, not only because of the seriousness of this matter to petitioner's business, which may be substantially destroyed, but because the entire philosophy underlying this Court's interpretation of the Commerce Clause should not be uprooted without plenary consideration and a full opinion. In this connection, the case at bar goes much further than *Fairfax Family Fund v. California*, 382 U. S. 1 (1965), where Mr. Justice Douglas, dissenting from the Court's dismissal for want of a substantial federal question, pointed out that the Court was departing from established Commerce Clause precedents.

If new law is to be made here, petitioner urges that it not be made without full scale briefs and oral argument; that it not be made with the single sentence, "The appeals are dismissed."

CONCLUSION

For the reasons set forth above and in petitioner's Jurisdictional Statement and Reply Brief, petitioner prays that this petition for rehearing be granted.

Respectfully submitted,

ARNOLD K. MYTELKA,
ROGER S. CLAPP,
Counsel for Petitioner First Mercantile Consumer Discount Company,
744 Broad Street
Newark, New Jersey 07102

Of Counsel:

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

ARNOLD K. MYTELKA,
Counsel for Petitioner.

APPENDIX

Affidavit of Roger S. Clapp.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

ROGER S. CLAPP, being duly sworn according to law upon his oath, deposes and says:

1. I am an Attorney at Law of the State of New Jersey, a member of the firm of Clapp & Eisenberg and a member of the Bar of the Supreme Court of the United States.

2. As counsel for First Mercantile Consumer Discount Company in this appeal, I received a letter from the Clerk of the United States Supreme Court dated October 12, 1970, a copy of which is annexed hereto.

3. Said letter sets forth the Order of the United States Supreme Court dismissing this and a related appeal, but the Order does not indicate whether the dismissals were ordered for want of a substantial federal question or because the judgment below was not final.

4. In an effort to ascertain the basis for the Order I telephoned Mr. Edmund P. Cullinan and Mr. Michael Rodak, Jr. of the United States Supreme Court Clerk's Office on October 15, 1970. Both verified that the language of the Order as set forth in the letter to me dated October 12, 1970 attached hereto is correct, and they advised that there was nothing that they could do to determine

the basis for the Court's Order. They suggested that a Petition for Rehearing was the appropriate method to determine the basis for the Order.

/s/ ROGER S. CLAPP
Roger S. Clapp

Sworn and subscribed to
before me this 27th day
of October, 1970.

/s/ ANNA M. WASS
Anna M. Wass
Notary Public of New Jersey
My Commission Expires Aug. 20, 1974

Order of Dismissal

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

October 12, 1970

E. ROBERT SEAVER
Clerk of the Court

ROGER S. CLAPP, ESQ.
CLAPP & EISENBERG
744 Broad St.
Newark, N. J. 07102

Re: *First Mercantile Consumer Discount Co.* v. *Stefanelli, et al.*, No. 256; *Oxford Consumer Discount Co. of North Phila.* v. *Stefanelli, et al.*, No. 257, Oct. Term, 1970

Dear Sir:

The Court today entered the following order in the above-entitled cases

The appeals are dismissed. Mr. Justice Black and Mr. Justice Stewart are of the opinion that probable jurisdiction should be noted.

Very truly yours,

E. ROBERT SEAVER,
Clerk
By
Assistant Clerk

Order of Dismissal

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